

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL JOHN MODENA,

Petitioner,

v.

MIKE MERCER,

Respondent.

Case No. 1:09-cv-1034

HONORABLE PAUL L. MALONEY

**ORDER ADOPTING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION WITHOUT OBJECTION**

The Court has reviewed the Report and Recommendation (Doc. No. 4) filed by United States Magistrate Judge Joseph G. Scoville in this action on December 21, 2009 (“R&R”). The Report and Recommendation mailed to the Petitioner was returned to the Court marked “Refused.”

Even though the Petitioner has returned the copy of the Report and Recommendation, Petitioner has been properly served under the Federal Rules of Civil Procedure. As required by statute, the magistrate judge filed the Report and Recommendation with the Court and mailed a copy to the Petitioner at his last known address. *See* 28 U.S.C. § 636(b)(1)(C) (“the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.”). Upon placing the Report and Recommendation in the mail to the Petitioner’s last known address, service was complete under FED. R. CIV. P. 5(b)(2)(C).

Like other federal courts to address the issue, this court treats a refusal to accept an R&R the same as any other failure to file timely objections to an R&R. *Accord Collins v. Oklahoma*, 200 F.

App'x 827, 828 (10th Cir. 2006) (noting with approval, "Although the clerk's office mailed Collins a copy of the report and recommendation, . . . Collins refused delivery of it. [T]he district court, having received no objections from Collins to the report and recommendation, adopted it in full . . ."), *cert. denied*, 549 U.S. 1215 (2007); *Sony BMG Music Entertainment v. Thurmond*, 2009 WL 4110292, *1 (E.D.N.Y. Nov. 24, 2009) ("[T]he second mailed copy of the report and recommendation was returned as undeliverable because defendant refused delivery. * * * [T]he Court now adopts in full the recommendation . . ."); *Williams v. Ayers*, 2009 WL 2589525, *1 and n.1 (M.D. Ga. Aug. 19, 2009) (after copy of July 1 R&R mailed to *pro se* civil-rights plaintiff was returned as undeliverable on July 20, court adopted R&R without review on August 19).¹

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"A party, not the district court, bears the burden of keeping the court apprised of any changes in his mailing address." *Lewis v. Jones*, 2007 WL 1287761, *1 n.1 (W.D. Mich. May 2, 2007) (Wendell Miles, J.) (quoting *Carey v. King*, 856 F.2d 1439, 1441 (9th Cir. 1988)).

Accordingly, district courts in our circuit routinely adopt R&Rs without review where the losing party never received the R&R due to his failure to inform the court of his current address. *See Thompkins v. Metrish*, 2009 WL 2595604, *1 n.1 (W.D. Mich. Aug. 20, 2009) (Quist, J.) (adopting R&R without objection and stating, "[T]he [R&R] sent to Petitioner was returned marked 'paroled.' 'Petitioner has the duty to inform the court of any address changes,' and it is not incumbent upon this court or its staff to keep track of Petitioner's current address.") (quoting *Kelly v. Wal-Mart, Inc.*, 2007 WL 2847068, *1 (N.D.N.Y. Sept. 26, 2007)) (internal alterations omitted); *Sullivan v. Caruso*, 2008 WL 356878, *1 (W.D. Mich. Feb. 7, 2008) (Jonker, J.) (adopting R&R which had been returned as undeliverable and noting, "[u]nder W.D. MICH. LCIVR 41.1, '[f]ailure of a plaintiff to keep a court apprised of a current address shall be grounds for dismissal for want of prosecution.'");

Tomilson v. Lazaroff, 2008 WL 2796549, *1 (S.D. Ohio May 11, 2009) (James Graham, J.) ("[P]etitioner's notification of the . . . Report and Recommendation was returned as undeliverable, because petitioner apparently no longer resides at the Madison Correctional Institution; however, it is petitioner's responsibility to keep the Court advised of his current whereabouts.");

Cargille v. US Courthouse, 2008 WL 957486, *1 (S.D. Ohio Apr. 8, 2008) (Susan Dlott, J.); *Beckert v. Warden*, 2008 WL 974834, *1 (S.D. Ohio Apr. 8, 2008) (Edmund Sargus, J.); *Hill v. Smith*, 2007 WL 3046451, *1 (S.D. Ohio Oct. 16, 2007) (Michael Watson, J.).

Accord Brown v. Director, TDCJ-CID, 2009 WL 3448178, *1 (E.D. Tex. Oct. 22, 2009) ("Although the court sent the report and recommendation to Petitioner's last known address, the instrument was returned with the notation 'RTS Released,' and it does not appear that the Petitioner

After being served with a Report and Recommendation issued by a Magistrate Judge, a party has ten days to file written objections to the proposed findings and recommendations. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b); *US v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005). Failure to file an objection results in a waiver of the issue and the issue cannot be appealed. *Id.*; *see also Thomas v. Arn*, 474 U.S. 140, 155 (1985) (upholding the Sixth Circuit’s practice). No objections have been filed to date.

The Petitioner’s failure to file objections alone is a sufficient reason to adopt the Report and Recommendation without review. *See Thomas v. Arn*, 470 U.S. 140, 150, 149-50 (1985) (“It does not appear that Congress intended to require district court review of a magistrate’s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings.”). *See, e.g., Russell v. Caruso*, 2007 WL 3232126, *2 n.3 (W.D. Mich. Oct. 30, 2007) (Maloney, J.) (quoting *Thomas*, 474 U.S. at 150); *Tangwall v. Robb*, 2003 WL 23142190, *1 (E.D. Mich. 2003) (Lawson, J.) (after untimely objections, court stated, “the failure to object to the magistrate judge’s report releases the Court from its duty to independently review the motion.”); *Coots v. Astrue*, 2009 WL 1326260, *1 (E.D. Ky. May 12, 2009) (Van Tatenhove, J.) (“When no objections are made, this court is not required to review a magistrate judge’s factual or legal conclusions, under a *de novo* or any other standard”) (citation & internal quotation marks omitted).

In any event, this Court has reviewed the merits of the report and finds the magistrate judge’s reasoning and conclusions to be sound.

Accordingly, **IT IS HEREBY ORDERED:**

has supplied the court with his current address. Thus, no objections have been filed. The Court finds that the magistrate’s findings and conclusions are correct, and adopts them”).

1. The Report and Recommendation (Dkt. No. 4) is **ADOPTED**;
2. The petition for writ of habeas corpus is **DISMISSED** for the reasons stated in the Report and Recommendation.
3. A certificate of appealability is **DENIED**, because reasonable jurists could not disagree that the petitioner has not made a “substantial showing of a denial of a constitutional right”, 28 U.S.C. § 2253(c)(2).

This action is terminated.

Date: January 20, 2010

/s/ Paul L. Maloney
Honorable Paul L. Maloney
Chief United States District Judge